FILE COPY

APR 6 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID T. SEARLS
J. EVANS ATTWELL
2100 First City National Bank Building
Houston, Texas 77002

JACK D. HEAD
P. O. Box 2521
Houston, Texas 77001

Of Counsel:

LYNN R. COLEMAN
PLATT W. DAVIS III

VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Eastern Transmission Corporation, has heretofore filed a Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 20, 1969. In accordance with Rule 23(i) of this Court, Texas Eastern submits as a supplement to Appendix B of said petition copies of the orders of the Federal Power Commission, Opinion Nos. 540 and 540-A, which were affirmed by the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,
DAVID T. SEARLS
J. EVANS ATTWELL
JACK D. HEAD
Attorneys for Petitioner

Of Counsel:

LYNN R. COLEMAN
PLATT W. DAVIS III
VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

(734)

734*

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Refunds - Flow-through

Texas Eastern Transmission Corporation

Docket No. RP66-12

OPINION No. 540

OPINION AND ORDER
MODIFYING INITIAL DECISION
(Issued May 3, 1968)

BAGGE, Commissioner:

FACTS

This proceeding was instituted by an Order issued on October 4, 1965,

> to determine the extent to which, if any, Texas Eastern is entitled to receive and retain any of the sums of monies collected from Tex-

735

> as Eastern by its jurisdictional suppliers which the suppliers have been directed to refund with interest, but which pursuant to [Commission] orders . . . , they have been directed to hold pending further order of the Commission.[1]

---

* These numbers represent pages in the Record to which Texas Eastern's Petition For Writ of Certiorari is referenced.

[1] 34 F.P.C. 1099, 1101-02 (1965).

The sums which have been accumulated pursuant to these orders now exceed $10,000,000 and relate to Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive. Throughout this period, Texas Eastern charged its customers rates established in a settlement agreement approved by Order of the Commission on January 25, 1961.[2]

On December 27, 1965, Texas Eastern filed a petition in the United States Court of Appeals for the Fifth Circuit seeking review and stay of the October 4, 1965 Order. It argued that the Commission has no statutory authority to allocate refunds; that the retention orders violate express provisions of prior orders and related settlement agreements entitling the petitioner to receive and retain the refunds for its own benefit; that petitioner did not pass on to its customers United's rate increases and that therefore

it should not have to pass on refunds representing the rate increases; that the Commission's orders requiring Texas Eastern to reduce its rates for past periods constitute retroactive ratemaking. In response, the Commission filed a motion to dismiss Texas Eastern's petition as premature. On February 10, 1966, the Court dismissed the petition and denied the stay, stating:

> In short, the state of the law, as well as the procedural posture of the controversy, argues strongly for judicial hands off until the Commission has, in the first instance, decided where it wants to go and what it wants to do with refunds.[3]

---

[2] 25 F.P.C. 172 (1961).

[3] Texas Eastern Transmission Co. v. F.P.C., 357 F.2d 232 (5th Cir. 1966).

Hearings then commenced September 19, 1966, and concluded October 13, 1966. Thereafter, Examiner Alvin A. Kurtz issued an initial decision, the thrust of which is reflected in the following finding and conclusion:

> The evidence in this proceeding and the applicable law do not support Texas Eastern's claim of entitlement to the contested refunds. In line with the *Interstate* case, further proceedings are necessary to insure that the sums here at issue, to the extent possible, be
>
> 737
>
> passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act.[4]

Exceptions to the Examiner's decision were filed by Texas Eastern, Manufacturers Light and Heating Company (Manufacturers), The Ohio Fuel Gas Company (OFG), and The Independent Natural Gas Association of America (INGAA). Briefs in opposition thereto were filed by The People of the State of California and the Public Utilities Commission of the State of California (California), Public Service Commission of the State of New York (New York), Brooklyn Union Gas Company (Brooklyn Union), Philadelphia Gas Works Division of the United Gas Improvement Company (UGI), and the Commission Staff. Oral argument was heard on October 9, 1967.

In briefs on exceptions and at oral argument, Texas Eastern and its supporters, Manufacturers, OFG, and INGAA, argued that the Commission has no power to order disposition of the subject refunds as the Examiner has done, that the Examiner's disposition of the subject refunds constitutes retroactive ratemaking, that Texas

[4] Initial Decision, p. 13.

Eastern is "equitably entitled" to the subject refunds, and that Texas Eastern is entitled to the subject refunds under the 1961 settlement agreement and various Commission orders.

738

HOLDING

We agree with the Examiner's conclusion that Texas Eastern has not established entitlement to all of the subject refunds. Accordingly, with the additional findings and modifications expressed herein with respect to the proper disposition of the subject refunds, and to the extent consistent herewith, we adopt the initial decision as our own.

THE ACT: PLAIN MEANING AND LEGISLATIVE HISTORY

Texas Eastern, Manufacturers, OFG, and INGAA except to the Examiner's finding that the Commission has power to order disposition of the subject refunds to a person other than Texas Eastern. They argue that neither the Natural Gas Act (Act) nor the courts' interpretation of it predicates a basis upon which that power may be exercised. California, New York, Brooklyn Union, UGI, and Staff, on the other hand, contend, and we agree, that the Commission has such power.

Texas Eastern, citing judicial and lexical definitions, argues that the plain meaning of the word "refund" intrinsically denotes repayment to the person who paid. That argument

739

is not persuasive in the context of this proceeding. The cited definitions stem from contexts other than the Natural

Gas Act. To rely upon them as conclusive of Congress' intent herein would lose sight of the fact that we are concerned with the term "refund" as a concept and practice indispensable to effective and meaningful rate regulation under the Act.

Even in situations where statutory terms are plain, our examination of the canons of statutory construction employed by the courts makes it "perfectly clear that if the literal import of the words is not consistent with the legislative intent . . . the words of the statute will be modified by the intention of the legislature." 2 Sutherland, *Statutory Construction*, 333. The leading case of *Gray* v. *Powell*, 314 U.S. 402 (1941), comports with this canon and sets forth the proposition "that courts, rather than exercising an independent judgment when reviewing an administrative application of statutory term to undisputed facts, should affirm the administrative decision if it has a rational basis." Gellhorn & Byse, *Administrative Law*, 512. See also *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 (1944). In applying the statutory term "refund" to the undisputed facts of this proceeding, it is our responsibility to effect policies which further the Congressional standard of the public interest. See *Atlantic Refining Co.* v. *Pub. Serv. Com-*

m'n., 360 U.S. 378 (1959). Keeping in mind the significance of this proceeding to effective and meaningful rate regulation in the public interest, we must take cognizance of Congress' intent and look to the meaning of "refund" in the broader context of Section 4(e) and, indeed, the entire Act.

The Commission's power to suspend rate increases for limited periods and to order the disposition of refunds

which result from putting the increased rates into effect at the end of the suspension period, but prior to a determination of whether they are just and reasonable, is derived from Section 4(e) of the Act, which provides, *inter alia:*

> Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.

This language affirmatively sets forth the statutory power of the Commission to act on refunds: "to order such natural-gas company to refund, with interest. . . ."[5] It also defines the subject over which the Commission may exercise its refund power: "the portion of such increased rates

[5] The Court of Appeals, in *Niagara Mohawk Power Co.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), noted in referring to section 309 of the Federal Power Act, the counterpart of section 16 of the Natural Gas Act, "We are mindful of the liberal interpretation the Supreme Court has given similar provisions in other statutes as reflecting a broad authority, and in appropriate cases a correlative duty, to effectuate the public interest." Section 16 in pertinent part authorizes this Commission "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this act." It is clear that section 16 is perfectly consistent with the Commission's power to order the disposition of refunds under section 4(e).

(741)

or charges by its decision not found justified." *It does not on its face, however, prescribe to whom the ordered refunds must be paid.* On this point the legislative history is illuminating.

The Natural Gas Act followed enactment of the Interstate Commerce Act and the Federal Power Act. Being the first regulatory law of its kind, the Interstate Commerce Act at times served as a prototype for subsequent regulatory legislation. Thus, it is not surprising that in certain respects the Power Act

742

and Gas Act followed very closely, indeed sometimes identically, the language of the Commerce Act. Nor is it surprising that in certain other respects the Power Act and Gas Act, because they deal with different industries, departed from the language of the Commerce Act. Where the language of a provision common to the Acts is similar, this similarity is an important aid to statutory construction. Where the language of a provision common to the Acts is not similar, this too is an important aid, for the dissimilarity serves to emphasize a difference in the meaning of the provisions. Such a dissimilarity is an outstanding feature in the legislative history of the refund provision of Section 4(e), which discloses Congress' use of certain refund language in the Commerce Act, the adoption of identical refund language in the Power Act; the inclusion of identical language in the early natural gas bills; but the ultimate elimination of that language from the Gas Act as adopted.

The refund provision of the Commerce Act is a part of Section 15(7). It empowers the ICC to order railroads "to refund, with interest *to the persons in whose behalf such*

amounts were paid, such portion of such increased rates and charges as by its decision shall be found not justified." (Emphasis added.) Similarly, Section 205(e) of the Power Act directs the FPC to

order any refunds "to persons in whose behalf such amounts were paid." The early natural gas bills, H.R. 5423, 74th Cong., 1st Sess. (1935); H.R. 11662, 74th Cong., 2d Sess. (1936); S. 4480, 74th Cong., 2d Sess. (1936), include the identical refund provision. However, the phrase "to the persons in whose behalf such amounts were paid" is absent from the later natural gas bills, H.R. 12680, 74th Cong., 2d Sess. (1936); H.R. 4008, 75th Cong., 1 Sess. (1937); H.R. 6586, 75th Cong., 1st Sess. (1937), and is not a part of the Gas Act.

In view of Congress' consideration of certain language in the early natural gas bills and the elimination of that language thereafter, we find no merit in the argument of Texas Eastern and its supporters that we should read into Section 4(e) the very words which Congress took out. The fact that testimony given at Congressional hearings held on the natural gas bills includes statements that the Gas Act is "substantially similar" to the Power Act is in no way inconsistent with this finding. There is, indeed, a similarity between the general language of those acts. The controlling fact, however, is that there is a dissimilarity between the specific refund language of those acts.[6] Con-

[6] Our concern in this proceeding, of course, is construction of the Natural Gas Act. Construction of the Interstate Commerce Act or the Federal Power Act is not in issue, although it would appear that even under the language of those acts the specific person who pays the overcharge may not necessarily be the identical person who receives the refunds.

(743)

gress has spoken with direction. It is

744

our responsibility to respect those words and adhere to the Congressional mandate.[7]

Since the literal wording of the Act does not direct to whom the subject refunds must be paid and since Texas Eastern has no legal right thereto, we think the statutory scheme and purpose of the Act provide the necessary guidance for determination of who should receive the subject refunds. In *Texas Eastern Transmission Co.* v. *FPC, supra,* at 239, the Court stated:

> From well-head to pipeburner any or all of the distributors and users of United's natural gas may have equitable claims to the refunds. *But overriding all claims is the public's interest in Commission procedures and process that will produce reasonable rates. The dimensions of the problem, including particularly the responsibility of the Commission to discharge its statutory duty to protect the public interest,* require that the Commission give full consideration to all of the relevant legal and

745

> policy issues. We do not see how the Commission can accomplish that purpose without a searching inquiry into all of the conflicting considerations against a back-

---

[7] See, generally, for a discussion of the case-law governing statutory construction vis-a-vis administrative agencies, the article of N. L. Nathanson, Professor of Law, Northwestern University, "Administrative Discretion in the Interpretation of Statutes," 3 *Vanderbilt L. Rev.* 470 (1950).

drop of cold facts, practical consequences, and statutory purposes. [Emphasis added.]

We are mindful that the Act was promulgated to protect ultimate consumers of natural gas from excessive charges. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). It provides a "complete, permanent, and effective bond of protection" for those consumers. *Atlantic Refining Co.* v. *Pub. Serv. Comm'n.*, 360 U.S. 378, 388 (1959). They are the intended beneficiaries of rate regulation, and, when the Act is applied, it is their collective interest that must guide the way. *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). Thus, on the facts of this record, and on consideration of "the revelant legal and policy issues," *Texas Eastern Transmission Co.*, v. *FPC*, *supra* at 239, we find that under the Act the ultimate consumers of natural gas are proper beneficiaries of our disposition of the subject refunds.[8]

746

The structure of the Act and the reach of our jurisdiction over the subject refunds do not extend directly to the ultimate gas consumers. This proceeding indeed would be a desirable case for practical implementation of the poetic pronouncement that "man's reach must exceed his grasp." But, given the limitations of jurisdiction circumscribed by law rather than poetry, we must assume that the affected state commissions will discharge their respective responsi-

[8] *Cf.* Pub. Serv. Comm'n. v. FPC, 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied, sub nom.* Prado Oil & Gas Co. v. FPC, 377 U. S. 963 (1964), where the Court of Appeals stated:

> The basic purpose of the National Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity.

(746)

bilities in furtherance of the objectives of their legislative charters, the Natural Gas Act, and the action we take herein. The regulatory commissions of California and New York made clear their intentions to assure that ultimate gas consumers receive the full benefits of our action. We can only encourage all affected state commissions and distribution companies to share, and indeed to effectuate, those intentions.

DISCUSSION

It is axiomatic that this Commission may not order reparations. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). That power was delegated to the Interstate Commerce Commission, but was withheld under the Natural Gas Act. Texas Eastern and its supporters argue that disposition of the subject refunds to a person other than Texas Eastern

747

would constitute an award of reparations. Specifically, Texas Eastern argues, "Reparations would clearly be involved since Texas Eastern would be required to give up what it is entitled to receive and retain in the absence of a retroactive review of the past firm rates charged to its customers."[9] The major defect of this argument, however, is that it assumes the answer to the very question in issue — whether Texas Eastern is indeed "entitled to receive and retain" the subject refunds.

When we focus on the actual mechanics of what is involved, the unsoundness of Texas Eastern's "reparations" argument becomes clear. The rates charged by Texas East-

[9] Brief on exceptions, p. 62.

ern to its customers during the years in question were established in 1961. In this proceeding we are neither recomputing those rates nor requiring Texas Eastern, retroactively or otherwise, to return to its customers any amounts or portion of total sums it previously collected under its established rates. To the extent that this proceeding may be labeled a rate proceeding at all, it is one ancillary to the rate proceedings which fixed the rates of Texas Eastern's suppliers and determined that the rate increases they collected subject to refund were unlawful. Indeed, as the Court of Appeals noted, this

748

proceeding was instituted to provide the "backdrop of cold facts, practical consequences, and statutory purposes." *Texas Eastern Transmission Co.* v. *FPC, supra* at 239, necessary to answer the question of how to dispose of the monies which Texas Eastern's suppliers collected, subject to refund, in those other proceedings. Whatever the answer to this question, and whatever may be Texas Eastern's rights to the subject refunds, no retroactive review of the past firm rates charged Texas Eastern's customers is involved.

Texas Eastern and its supporters contend that because Texas Eastern paid increased rates to its suppliers and did not file "tracking" rate increases, Texas Eastern "absorbed" its suppliers' increased rates, and therefore, has legal and equitable rights to the subject refunds. Although other parties object to characterizing Texas Eastern's action as "absorbing" its suppliers' rate increases, it is a matter of record that during the years in question, Texas Eastern did not file increased rates. Similarly, it is a matter of record, and indeed of law, that throughout these

years Texas Eastern had a right to file rate increases under Section 4 to meet its suppliers' rate increases in whole or part. This is the context in which we must evaluate Texas Eastern's contention.

In our opinion, Texas Eastern's failure to exercise its statutory right to track its suppliers' rate increases by filing rate increases of its own does not as a

matter of law support Texas Eastern's claim to the refunds ordered in the suppliers' rate proceedings. Texas Eastern had contractual obligations to purchase gas at the prices authorized in its contracts with its suppliers. The refunds now in issue stem from the fact that increased rates paid by Texas Eastern, pursuant to these contractual obligations, were suspended and subsequently held to be unjust and unreasonable, or were reduced pursuant to a settlement of a supplier's rate proceeding. If Texas Eastern had passed the increased charges on to its customers by filing tracking rate increases, it could, of course, in the proceeding held on its rate increases, claim that its higher rates were justified by the increased rates its suppliers had in turn justified and kept. But, it does not follow that Texas Eastern's failure to file tracking rate increases justifies its retention of that portion of its suppliers' rate increases which were subsequently ordered to be refunded. For that erroneously assumes that Texas Eastern has a statutory right to be reimbursed for every increase in its purchased-gas costs, and can exercise this right either by filing a tracking rate increase or, at its option, by "absorbing" its suppliers' rate increases with the thought that they will be held to be unjustified, and that Texas Eastern automatically will receive the refunds.

750

The unsoundness of such an assumption can be simply demonstrated. Assume a supplier of Texas Eastern puts into effect, subject to refund, a rate increase aggregating $1,000,000 over a period of one year. Assume Texas Eastern then files, and puts into effect, a tracking rate increase amounting to $1,000,000. It is clear that in such a situation the fact that the supplier justifies all of its $1,000,000 increase in its rate proceeding would not determine Texas Eastern's entitlement to any of the $1,000,000 involved in Texas Eastern's tracking rate proceeding. Instead, depending upon its overall cost-of-service presentation, Texas Eastern might be shown entitled to only part, or even none, of the $1,000,000 — though it paid that amount to, and gets no refund from, its supplier — and might prospectively end up with rates lower than those which it had at the start of the proceeding.

If, in the above example, we assume that the supplier justifies half of its $1,000,000 increase, but Texas Eastern, as before, justifies no increased rates (even assuming that $1,000,000 increase in its costs), we would face a situation where the supplier would keep $500,000, and Texas Eastern would be required to return the $1,000,000 it collected from its customers on the assumption that the supplier would keep all of the $1,000,000 Texas Eastern paid. This would leave for disposition by the Commission the refunds of $500,000 which the supplier would be required to make. Clearly, Texas Eastern would have no entitlement to

751

those refunds, either contractually or as part of the statutory scheme under the Act. For Texas Eastern was con-

(751)

tractually obligated to pay its supplier $1,000,000 and its tracking rate proceeding showed that, despite incurring the costs of the entire $1,000,000 supplier rate increase, it was not entitled to charge higher rates.

In short, the statutory right of a pipeline to file any contractually authorized rate increase, whenever it believes its cost-revenue situation so requires to maintain a reasonable rate of return on its investment, is merely the procedural device established in the Act by which it can seek higher rates when its costs go up, including increased costs which are contingent upon other rate proceedings. This device does not give the pipeline any substantive right to recoup increased costs regardless of its financial position. And, the pipeline cannot, by opting not to file (and thus protecting itself against the possibility of having its rates decreased), secure a substantive entitlement to such portion of its supplier's increase which may be held unjustified.

The more difficult question is whether it is necessary or appropriate to give a pipeline like Texas Eastern, which has paid rate increases but not filed tracking rate increases, a second opportunity to show

752

that it is entitled to be reimbursed for its increased purchased-gas costs in the proceedings subsequently held to determine the appropriate distribution of its suppliers' refunds. In a somewhat analogous situation, involving a court's disposition of a fund created by its stay of a Commission rate reduction order, the Supreme Court in *FPC* v. *Interstate Gas Co.*, 336 U.S. 577 (1949), concluded that some situations are "conceivable" in which intermediate pipelines (such as Texas Eastern in this proceeding) would

have a claim to the fund, and the court should thus allow those pipelines to attempt to make the requisite showing. The opinion of the Court, delivered by Justice Douglas, refers to only one specific situation where the intermediate pipelines necessarily "would be entitled to the refunds"— where they had already passed on the stayed rate reduction to their customers and thus had "done all in their power to effectuate the policy of the Act." But, the majority of the court did not foreclose court consideration of claims by an intermediate pipeline to the refunds on grounds the pipeline could show it made less than a reasonable return during the period the fund was created.

We do not believe that *Interstate* compels us, in the rate increase situation we are faced with here, to give every pipeline that may subsequently be in Texas Eastern's position the right, after foregoing a tracking rate increase of its own, subsequently to make the same type of showing — free of the risk of having its rates adjusted downward — in the

proceeding held on the disposition of its suppliers' refunds. Aside from the possible differences between the roles of a court of equity and an administrative agency operating under a discrete statute, there is a significant difference between the rate decrease situation presented in *Interstate* and the rate increase situation involved here, an intermediate pipeline faced with a rate decrease ordered by the Commission obviously is less able to invoke the rate change provisions of the Act to protect itself against being in a deficit provision in the future if the supplier rate decrease ordered by the Commission were to be set aside. However, in any event, assuming the majority viewpoint

(753)

in *Interstate* is governing herein, we will resolve the question not reached by the Court by holding that neither the letter nor spirit of the Act requires a pipeline which has chosen not to file tracking increases, where its suppliers have filed rate increases, to get a risk-free second chance to demonstrate its need for greater revenues in the proceedings to dispose of its suppliers' refunds.

It may be contended that the effect of this conclusion will be a great proliferation of protective rate increases and a concomitant increase in the Commission's workload. Any such result is unlikely. The factors going into a pipeline's decision to file a rate increase are many: the possibility of recovering an

754

indeterminate portion of supplier rate increases would not normally appear to be controlling. In any event, the additional complications of such rate increase proceedings as may result should not outweigh the complications which would result from the consideration of pipeline entitlement claims in each case where supplier refund dispositions are in issue.

While we thus do not expect in the future to entertain pipeline entitlement claims, we are cognizant of the contention strongly advanced by Texas Eastern here, that it would be unfair to apply the newly enunciated policy to it. In the absence of any previous Commission holding on this question of pipeline entitlement to supplier refunds, or of any challenge to the then normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds, Texas Eastern, it is suggested, could not reasonably have been expected to an-

ticipate this decision and protect its rights by filing a tracking rate increase.

We are persuaded that this argument has sufficient merit to justify according Texas Eastern an opportunity to show in the present proceeding what it might have demonstrated in a rate case had it been previously made aware of our ruling here. See *Niagara Mohawk Power Corp.* v. *FPC*, *supra* at 160. This opportunity was expressly accorded Texas Eastern in the present proceeding by our Order of October 4, 1965. But, Texas Eastern has not even excepted to the Examiner's conclusion, fully supported by the record,

that in each of the three years in issue Texas Eastern in fact earned substantially more than a reasonable rate of return on its investment. Under these circumstances there is no merit to the contention that it is inequitable to apply the policy enunciated in this decision to Texas Eastern.

We wish to make clear that the opportunity which we afforded Texas Eastern here to contend it was entitled to a portion of the refunds, because in the period in question it earned less than a reasonable return, will not be afforded to it or any other pipeline with respect to supplier refund obligations accruing subsequent to the date of this opinion. Moreover, it is only available to those pipelines who actually incurred increased costs as a result of effective supplier rate increases but did not file tracking rate increases. Where such tracking increases were filed, the proceedings thereon will determine the pipeline's entitlement to any increased revenues. Where, as is the case with Texas Eastern's pipeline-purchasers, no additional costs related to the supplier increases were incurred, it is clear that no valid

(755)

claim to any part of the refunds can be premised on the revenue position of the pipeline-purchaser during the period of accrual.

While the foregoing discussion has dealt with Texas

756

Eastern's principal arguments, there are several ancillary matters which warrant our attention. The first concerns the portion of the refunds from Texas Eastern's suppliers which is not attributable to the gas Texas Eastern sold for resale subject to our jurisdiction. During the years in question, Texas Eastern made a minimal amount of direct sales, virtually all involving field sales to producers and pipelines. For the years 1962, 1963, and 1964, these direct sales were .6%, .8% and .7%, respectively, of Texas Eastern's total gas sales.[10] Perhaps because this small percentage represents a minuscule portion of Texas Eastern's business, there is nothing significant in the record concerning the disposition of refunds pertaining thereto, and nothing is argued thereon in the exceptions to the Examiner's initial decision or in the briefs before us. Nevertheless, since this proceeding is a case of first impression, we believe it appropriate to discuss the matter rather than to rely upon any possible waiver of rights by the parties.

Pipeline direct sales are of two types. Some pipeline direct sales are regulated by state commissions, or other competent state bodies — this is the normal situation with the retail sales of some jurisdictional pipelines (not including Texas Eastern) which also operate in part as local gas distributors. Other direct sales — typically main-line direct sales, or field sales

[10] Texas Eastern Transmission Corporation, Form 2, 1962, 1963, 1964.

of the type made by Texas Eastern — though constitutionally subject to state or local regulation, may not be within the delegated authority or jurisdiction of a state regulatory body, or, as a matter of policy, may be free from actual regulation.

In the first situation — sales which are non-jurisdictional only in the sense that they are regulated by state bodies rather than by this Commission — the responsibility for determining whether refunds should flow-through to the direct sales customers in whole or part, and the manner thereof, lies with the state regulatory bodies. In the second situation — sales which are not only non-jurisdictional but are also non-regulated — the relations between the parties are determined by contract. With respect to such sales, the legislatures, Federal and state, have determined that there is no public need for superimposing a regulatory authority upon the contractual rights of seller and purchaser when the seller's costs increase or decrease. This does not necessarily mean that such purchasers will not be entitled to the refunds attributable to their respective portions of the gas purchased and resold by the pipeline. Where the contract of the pipeline with the direct purchaser provides, as some direct sales contracts do, for automatic price escalations in the case of increased purchased-gas costs (or the

pipeline is entitled by contract to increase its rates and does so), the direct purchaser may well have a claim against the pipeline if all or part of such price increases are subsequently ordered to be refunded. See *Northern Natural Gas Co.* v. *FPC*, 245 F.2d 892, 898 (8th Cir. 1954). If, on the other hand, the direct sales contract provides for a

(758)

fixed price, then the pipeline, in effect having borne the risk of increased costs (and not being able to file tracking increases), may well be entitled to retain the portion of any refunds attributable to the sale. *Northern Natural Gas Co.* v. *FPC*, 254 F.2d 466 (8th Cir. 1958). But, in either case, the rights and obligations of the parties to the direct sales are matters of contract, and subject to resolution in judicial proceedings, rather than by a Federal or state regulatory body.

One consequence of the existence of unregulated direct sales rates may be that pipeline customers of Texas Eastern — which, unlike Texas Eastern, did not incur any increased costs of their own — will be able to retain portions of the refunds flowed-through to them. If the determination of the appropriate ultimate recipient of the refunds depended upon the relative equities of the two pipelines, it might well be argued that Texas Eastern has a greater claim. This, however, is not the situation; if either Texas Eastern or one of its pipeline customers is entitled to retain refunds attributable to unregulated direct sales (and nothing in this opinion should be taken as an indication that this is the fact), this result stems from the

759

contractual obligations between the parties to these unregulated direct sales. The uncertain nature of a pipeline-purchaser's obligations to flow-through refunds to a direct industrial purchaser, under a contract not subject to regulation, is no more basis for permitting Texas Eastern to retain that portion of the refunds than the possibility that local distributor-purchasers, subject to state regulatory authority, might be permitted to retain some or all of the refunds. Unlike the courts operating pursuant to their equitable powers in cases like *Interstate, supra*, we have

no authority to enforce potential consumer rights in either the direct sales or local distribution situation.

In addition to sales for resale subject to this Commission's jurisdiction, and direct sales subject to the jurisdiction of state regulatory bodies or entitrely unregulated, there is another way in which Texas Eastern disposes of gas it purchases from its suppliers. This is in the operation of the pipeline itself, as fuel or as line losses. During the years in question, the quantity of gas both utilized and lost and unaccounted for by Texas Eastern amounted to about 2.3% of its total gas receipts in 1962, 2.5% in 1963, and 1.7% in 1964.[11] The cost of this gas, however, is just as

760

much a part of Texas Eastern's cost of service and the price charged by Texas Eastern to its customers as the cost of the gas which is physically delivered to its customers, and any refunds attributable thereto should flow-through to Texas Eastern's customers just the same as other refunds. Where, as here, there are two types of sale — jurisdictional and non-jurisdictional— the refund attributable to gas utilized or lost and unaccounted for in pipeline operations should be allocated between the two classes, but this is a relatively easy procedure.[12]

---

[11] Texas Eastern Transmission Corporation, Form 2, 1962, 1963, 1964.

[12] Texas Eastern's Form 2 for the three years in question also lists the company's own production, as well as various amounts transported for others and exchanged with other pipelines. There are also entries for gas taken from and delivered to storage. The company's own production does not enter into the picture here since none of the refunds reflects such acquisitions. The other accounts roughly are in balance over a period of time and presumably would be so treated in any final allocation. Any questions as to their appropriate treatment can, of course, be handled in the further proceedings we are ordering.

(760)

It is clear at this juncture of the proceeding that we cannot and should not definitively enunciate Texas Eastern's rights with respect to the refunds relating to Texas Eastern's few non-jurisdictional sales. We do not know to what extent the states in which these sales take place assert jurisdiction over them, nor do we know the specific terms of the individual direct sales contracts. Thus, we shall direct the Examiner in the further proceedings we are ordering to make the appropriate allocation between refunds

761

attributable to Texas Eastern's jurisdictional and non-jurisdictional sales.

It appears to us from Exhibit No. 2 and data available in the dockets of Texas Eastern's suppliers that of the total sums for the years in question which those suppliers are required to refund to Texas Eastern, approximately 60 percent relate to the demand component of those suppliers[13] and 40 percent relate to the commodity component.[14] Texas Eastern, for the purpose of further flowing-through these refunds, will thus receive from its suppliers approximately 60 percent of the refunds through its demand component and approximately 40 percent through its commodity component. Accordingly, the allocation of the refunds between Texas Eastern's jurisdictional and non-jurisdictional customers, and the refunds among Texas Eastern's jurisdictional customers shall reflect the "as received" basis (approximately 60 percent demand and 40 percent commod-

[13] Refunds relating to the demand component result from purchases of Texas Eastern from United Gas Pipeline Company.

[14] We expect that accurate demand and commodity allocation percentages will be established in the further proceedings we are ordering.

ity).[15] Similar flow-through, on an "as received" basis (based upon the appropriate percentages for demand and commodity), shall be made by each of the natural gas pipeline

762

companies subject to our rate jurisdiction which receive refunds as a result of our action herein.

If any of Texas Eastern's pipeline-purchasers subject to our rate jurisdiction seek an opportunity to show, in light of the principles set forth in this opinion, that they are entitled to receive and retain a portion of the subject refunds, further proceedings, after duly published notice, will be required with respect to that portion.

PAST COMMISSION PRACTICE

Texas Eastern and its supporters argue that the Commission's past practice in ordering the disposition of refunds requires that we find Texas Eastern entitled to the subject refunds. This argument is unsound for two reasons: first, it presupposes that the Commission consciously and squarely faced the instant refund issue at an earlier date and that a firm policy was adopted; second, assuming *arguendo*, that such policy was adopted, it seeks to impose upon us the duty to perpetuate that policy notwithstanding its incompatibility with the legislative objectives. As all parties have recognized in their briefs, this proceeding involves an issue

763

of first impression as a contested matter before the Commission; it is a "novel" issue without administrative prece-

[15] *Cf.* United Fuel Gas Co., 32 FPC 1106 (1964).

dent.[16] The fact that the issue was not resolved by the Commission at some earlier date is not controlling.[17] What is controlling is that failure to resolve it correctly now would contravene the public interest.

764

THE 1961 SETTLEMENT AGREEMENT

The Examiner found,

> It is clear that the . . . [1961] settlement agreement refers to refunds relating to supplier rates then in effect, including the issue of refunds which might be

---

[16] "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act." Texas Eastern Transmission Co. v. FPC, *supra*.

[17] *Cf.* U. S. v. Morton Salt Co., 338 U.S. 632, 647-48 (1949), where the Supreme Court stated:

> Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, dicta from judicial opinions, views of text writers and facts of legislative history which would give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.
>
> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives or expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

Cf. also Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

generated by the then effective rates, and does not govern the refunds here at issue.[18]

Texas Eastern and its supporters except to this finding. Texas Eastern argues that "the Commission is faced with a controversy over the interpretation and meaning of a settlement contract,"[19] under which, if properly interpreted, Texas Eastern "has the right to receive and retain the refunds involved in this case."[20] In support of its position, Texas Eastern relies upon various provisions, read both jointly and severally, of the settlement agreement, and also upon testimony relating to what it claims was the necessary intent of the parties to the agreement; but an "intent" which was not made known to the Commission at the time the settlement agreement was placed before the Commission for approval or re-

jection. California, New York, Brooklyn Union, UGI, and the Commission Staff, however, contend, and we agree, that the Examiner's finding is correct.

Within the four corners of the settlement agreement, it is clear that there is no provision which precludes the action we are taking over the subject refunds, or which in any way purports to discuss how these refunds, in dockets which were not even in existence at the time the parties

---

[18] Initial decision, p. 13.

[19] Brief on Exceptions, p. 67.

[20] Brief on Exceptions, p. 66.

(765)

agreed to the settlement,[21] should be treated. If we were to accept Texas Eastern's argument and conclude, nevertheless, that the 1961 settlement agreement covers the subject refunds, we would first have to read into that agreement a provision which in fact is not there. As the Court of Appeals stated with

766

reference to a settlement agreement in *Texas Eastern Transmission Co.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), however, this Commission may not "read into contracts things which are simply not expressed or not there. . . .[22] The weight of our opiniion herein indicates that we are not relying upon the 1961 settlement agreement as an affirmative predicate for our authority over the disposition of the subject refunds; we are simply relying upon the record herein which discloses that the 1961 settlement agreement is not a bar to our action under the Act.

OTHER COMMISSION ORDERS

Texas Eastern argues that as a jurisdictional customer of United Gas Pipeline Company, Texas Gas Transmission

[21] Texas Eastern points out that some of its supplier rate increases, namely the rate increases of United filed on January 18, 1961, and Texas Gas filed on October 21, 1960, which led to a portion of the subject refunds were filed prior to the date the Commission approved the 1961 settlement agreement. Texas Eastern's 1961 settlement was based upon a cost of service which included all of the contingent rate increases being collected by Texas Eastern's suppliers as of October 27, 1959, and expressly provided for flow-through of refunds of suspended rate increases included in Appendix C to the settlement agreement. The rate increases of United and Texas Gas filed after October 27, 1959, but before January 25, 1961, the date the Commission approved the 1961 settlement agreement, were not included in Appendix C and were thus not a part of the settlement agreement.

[22] Cf. Manufacturers Light & Heat Co. v. FPC, 374 F.2d 88 (3rd Cir. 1967).

Corporation, and Southern Natural Gas Company, it is entitled to certain refunds under United Gas Pipeline Company's 1962 settlement, [23] Texas Gas Transmission Corporation's 1961 settlement,[24] and the 1963 Order terminating Southern Natural Gas Company's rate proceeding.[25] The

orders issued in those proceedings directed the respective pipeline suppliers to pay to their jurisdictional customers monies predicated upon a post-audit cost of service for United and Texas Gas, and upon a flow-through of future supplier refunds for United, Texas Gas, and Southern Natural.

The United, Texas Gas, and Southern Natural proceedings, specified above, were concerned solely with the lawfulness of the supplier rates there in issue. Supplier rates were established and refunds were ordered. As Brooklyn Union and the Commission Staff have pointed out, no designation of the ultimate persons entitled to retain these refunds was effected; such was not the issue. It is the issue in this proceeding, however, and we have herein determined that Texas Eastern has not established entitlement to all of these refunds.

The Commission finds:

(1) Texas Eastern has not established its entitlement to receive and retain all of the subject refunds.

(2) This proceeding should be remanded to the Examiner in order that he may make the appropriate allocation between refunds attributable to Texas Eastern's juris-

[23] 27 FPC 504 (1962).
[24] 26 FPC 924 (1961).
[25] 29 FPC 323 (1963).

dictional and non-jurisdictional sales, and order disposition of the subject refunds consistent with the views expressed herein.

768

The Commission orders:

This proceeding is remanded to the Examiner in order that he may make the appropriate allocation between refunds attributable to Texas Eastern's jurisdictional and non-jurisdictional sales, and order disposition of the subject refunds consistent with the views expressed herein.

By the Commission.
(SEAL)

Gordon M. Grant,
Secretary,

* * * * * * * * *

From Texas Eastern Transmission Corporation's Motion for Rehearing of Opinion No. 540, Filed with the Federal Power Commission on June 3, 1968.

* * * * * * * * *

22.

The Commission erred in holding that Texas Eastern is not entitled to receive and retain refunds attributable to purchases of gas during 1961.

769

Argument

The Commission holds that Texas Eastern is not entitled to the subject refunds because it "in each of the three years

in question" it "earned substantially more than a reasonable rate of return on its investment". (p. 12). The Commission's reference to the rate of return earned by Texas Eastern "in each of the three years in issue" is obviously directed to the years 1962, 1963 and 1964. (pp. 12 and 13). In thus confining its discussion of the rate of return earned by Texas Eastern to these three years, the Commission has completely overlooked the fact that on page 2 of its opinion the Commission recognizes that the refunds at issue "relate to Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive." There is no evidence whatever to support a finding that Texas Eastern earned in excess of a reasonable rate of return during the year 1961. Quite the contrary, the uncontradicted evidence establishes that the rates fixed in Texas Eastern's 1961 Settlement were designed to produce revenues commencing December 1, 1959 in an amount of $2,000,000 per annum less than the agreed upon settlement cost of service. In addition, in the year 1961, Texas Eastern refunded to its customers $2,000,000 more than the refunds to which they were entitled under the agreed upon settlement cost of service in Docket No. G-12706. Thus, in the year 1961, Texas Eastern's customers realized $4,000,000 more than they bargained for. Having expressly found that refunds for the year 1961 are at issue in this proceeding, the Commission obviously erred in ignoring that year and the evidence relating thereto in its findings as to refund entitlement.

* * *

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Refunds — Flow-Through

Before Commissioners:

Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Texas Eastern Transmission Corporation
Docket No. RP66-12

OPINION NO. 540-A
OPINION AND ORDER DENYING REHEARING

(Issued July 10, 1968)

On May 3, 1968, the Commission issued Opinion 540 adopted with certain modifications the Presiding Ex-

aminers decision in this proceeding. We agreed with his conclusion that Texas Eastern has not established entitlement to all of the refunds at issue herein. Texas Eastern and the Independent Natural Gas Association of America have filed applications for rehearing.

Both applications for rehearing reiterate arguments considered and rejected by the Commission in Opinion 540. We find nothing in the applications for rehearing which would cause us to alter our determinations. However, some additional comment is appropriate.

Texas Eastern alleges that our order in Opinion 540 constitutes unlawful discrimination, arguing that we re-

cently allowed Southern Natural Gas Company and Tennessee Gas Transmission Company to retain certain refunds. *United Gas Pipe Line Company,* 37 FPC 7. The Company cites this as a continuation of what it alleges has been the "normal practice" of the Commission to require payment of supplier refunds to the immediate pipeline purchaser. The arguments concerning past Commission practice generally have been discussed in Opinion 540. Insofar as our recent United Gas order is concerned, the refunds released to Southern Natural were governed by prior settlement orders that explicitly allowed Southern to retain (in part) refunds it received under specific United Gas dockets. *Southern Natural Gas Company,* 29 FPC 323, 356 (ordering paragraph (E)) and 29 FPC 779,

783-4 (finding paragraph (2)). Those refunds differ from the sums at issue here because none of the dockets giving rise to the present refunds was covered by Texas Eastern's 1961 Settlement.

Our United Gas order also distinguishes the Tennessee situation from this proceeding, which was pending before the Examiner. There we emphasized that the $142,604 released to Tennessee was "attributable to a transportation contract, not a purchase of gas . . ." The order indicates that the refund money would not have been released to Tennessee, if the refunds had related to a purchase of gas. Whether or not transportation contracts deserve different treatment, the essential point here is that the distinction, explicitly stated in the United order, would have been unavailable to Texas Eastern in any event, because all of the sums at issue here relate to purchase gas contracts, not to transportation.

(772)

Moreover, even if the amounts released to Tennessee were of the same character as the refunds here, it is obvious that their release was not intended to constitute a substantive determination of the Commission's refund policies. Considering the large amounts being retained pursuant to Commission orders and the pendency of this case, we would not have enunciated refund entitlement principles in an uncontested

773

order, based on short refund report letters by the interested parties. Furthermore, our intention not to prejudge the issue presented in this case is manifest in our January 4, 1967 order in *United Gas* which required retention of amounts attributable to pipeline purchasers whose refund obligations were in question. See 37 FPC 9. These included Michigan-Wisconsin Pipe Line Company, The Ohio Fuel Gas Company, and Texas Eastern.

Texas Eastern also contends that we erred in holding that it is not entitled to receive and retain refunds attributable to purchases of gas during the year 1961, because there was no showing that it earned more than a reasonable rate of return in that year. The order instituting this proceeding indicated that neither Texas Eastern's failure to file tracking increases nor the absence of any provisions relating to the subject refunds in Texas Eastern's agreements automatically entitled the company to these amounts. *Texas Eastern Transmission Corporation*, 34 FPC 1099 (1965). The order afforded Texas Eastern and all interveners the opportunity to file direct testimony "with respect to all matters of fact or policy which they believe material to a determination of the issues herein." 34 FPC at 1102. However, though Texas Eastern successfully per-

suaded the Examiner that refunds relating to that year were also in issue, it chose not to avail itself of the opportunity to introduce evidence that purported to show that Texas Eastern

774

earned less than a reasonable rate of return in 1961. Thus, the Presiding Examiner correctly concluded that the company had not proven entitlement for those amounts. Nor has it in its present application for rehearing asserted that it in fact failed to earn a reasonable rate of return in 1961, to say nothing of offering any factual support which would justify a further hearing on this point.

Texas Eastern also contends that it had inadequate opportunity to show that it had earned less than a reasonable rate of return for all the years involved. The alleged lack of opportunity stems from the order instituting this proceeding requiring the company to file earnings studies without certain normalizing adjustments. While we did in fact require such studies, our order did not preclude Texas Eastern from filing any other factual studies. Indeed, ordering paragraph (C) proffered a broad invitation to Texas Eastern to file any factual evidence the claimant considered relevant. Thus, Texas Eastern had ample opportunity to show what it might have demonstrated in a rate case had it been previously made aware of our ruling herein.

Texas Eastern contends that our order to flow through certain refunds, which have been paid to Texas Eastern pursuant to order in *Hunt Oil Company*, 30 FPC

220 (1963), constitutes a collateral attack on the *Hunt* order. The order issued therein specifically required Texas Eastern to hold the amounts in a special fund pending Commission action respecting disposition of the refunds. 30 FPC at 223. Therefore, as to those funds the company has always been a stakeholder.

In their application for rehearing INGAA and Texas Eastern argue that the decision we reached herein is inconsistent with the Supreme Court's recent decision in *F.P.C.* v. *Sunray DX Oil Co.*, ... U.S. ....., S. Ct. Nos. 60, *et al.*, O.T. 1967, decided May 6, 1968. They argue that the approved 1961 Texas Eastern settlement created firm rates which, like the final unconditioned initial prices referred to in *Sunray* (slip opinion at page 10), constitute "a lower limit below which a refund cannot be ordered." We are not ordering Texas Eastern to make the refunds proscribed in *Sunray;* we are not ordering Texas Eastern to reduce or refund any part of its firm rates established by the 1961 settlement. Our decision requires flow of refunds from Texas Eastern's suppliers to its resale customers.

The balance of the applications for rehearing filed by Texas Eastern and by INGAA repeat the arguments presented to the Commission on exceptions. We find nothing in

776

those arguments that would warrant our granting rehearing.

The Commission finds:

The assignments of error and applications for rehearing filed in this proceeding present no new facts or legal prin-

ciples which would warrant any change in, or modification of, the Commission's Opinion 540 in this proceeding issued May 3, 1968.

The Commissiion orders:

(A) Opinion No. 540 and its accompanying order issued May 3, 1968, are in all respects confirmed.

(B) The applications for rehearing filed in this proceeding and the request for relief contained therein are hereby denied.

By the Commission.
(SEAL)

Kenneth F. Plumb,
Acting Secretary.